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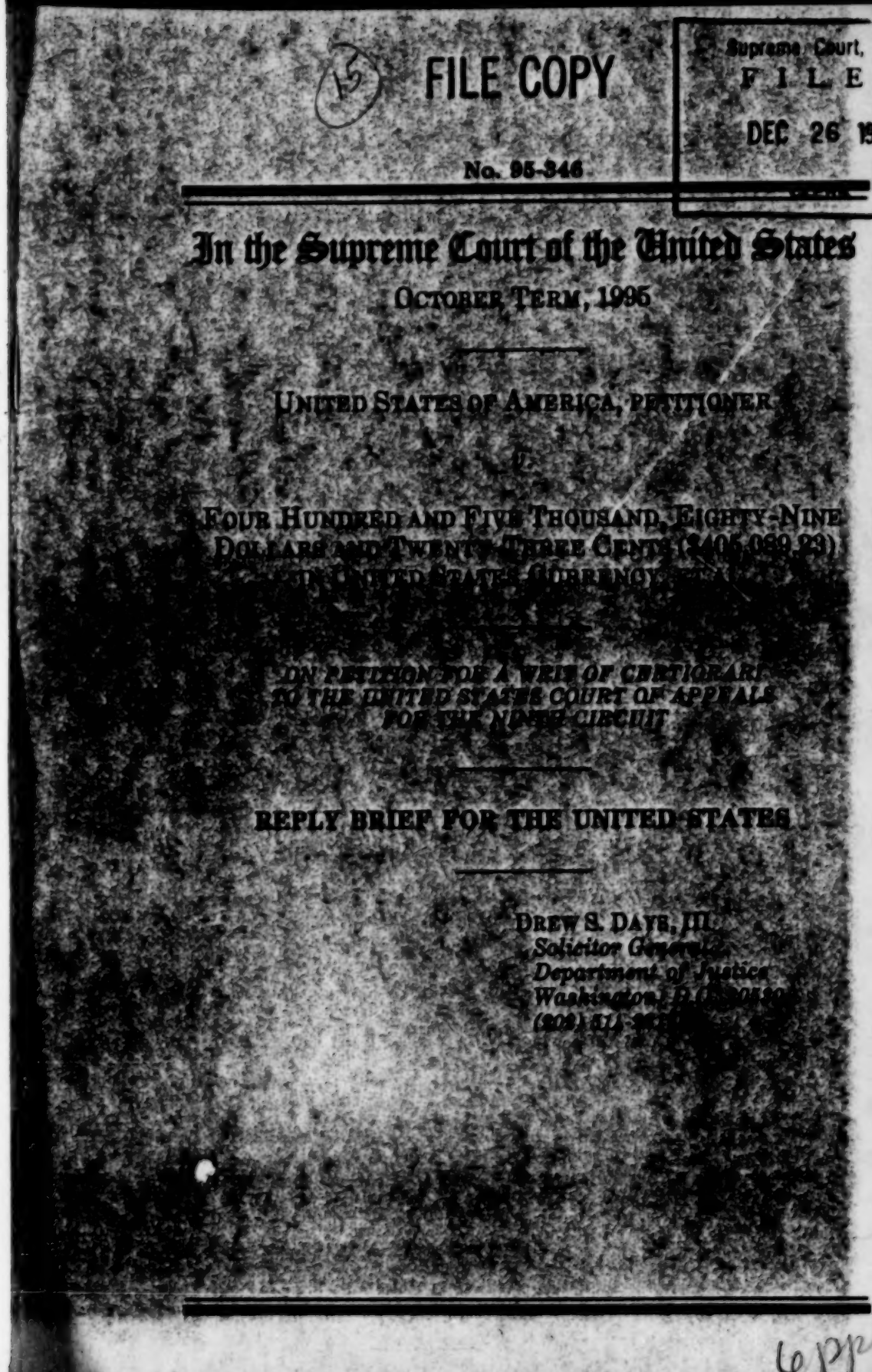

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No. 95-346

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent Wren agrees that the Court should grant certiorari in this case. Br. in Opp. 5. He contends, however, that this Court should reformulate the question presented. *Id.* at 1, 5. In Wren's view, the Court should consider only the question "whether forfeitures under [21 U.S.C.] § 881(a)(6) and [18 U.S.C.] § 981(a)(1)(A) are categorically punishment" for purposes of the Double Jeopardy Clause. *Id.* at 4; see also *id.* at i (restating question). Wren's attempt to reframe the question before the Court lacks merit.

Our petition presents the question whether the Double Jeopardy Clause prohibits a civil proceeding for the *in rem* forfeiture of property "alleged to be the proceeds of narcotics and money laundering activ-

ities," when the owners of the property were previously convicted of narcotics and money laundering crimes. Pet. (I). That question directly challenges the holding of the court of appeals that the issue of whether the forfeiture of such "proceeds" constitutes punishment for double jeopardy purposes is not determined by examining the particular property at issue, but is determined through a categorical analysis of the statute employed by the government:

> The government * * * asserts that *this* forfeiture involves only narcotics proceeds, and that such a forfeiture is entirely remedial. The government's position finds support in a recent Fifth Circuit case. *See United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994) (stating that the forfeiture of illegal proceeds does not constitute punishment) [cert. denied, 115 S. Ct. 573, 574 (1994)]. We nonetheless reject that argument. We do so because the government fails to recognize the legal standard that *Austin* [v. *United States*, 113 S. Ct. 2801 (1993)] established.
>
> Under *Austin*, in order to determine whether a forfeiture constitutes "punishment," we must look to the entire scope of the statute which the government seeks to employ, rather than to the characteristics of the specific property the government seeks to forfeit.

Pet. App. 16a (footnote omitted). Respondent's proposed revision of the question presented assumes that the Ninth Circuit is correct, *i.e.*, that a "categorical" analysis of the forfeiture statute is required. Our submission, reflected in our question presented, is that the characteristics of the specific property that the government seeks to forfeit *must* be examined—and that when the property constitutes "proceeds" of illegal activity, its forfeiture is remedial rather than punitive. Pet. 9-14.[1]

Respondent Wren also suggests that the question should be revised because the court of appeals found that, in light of the breadth of the forfeiture statutes at issue and the government's arguments in the district court, the government "cannot now claim that this case involves *only* the forfeiture of illegal *proceeds*." Br. in Opp. 1, 4, quoting Pet. App. 21a n.12. On its face, however, the court of appeals' statement does not suggest that *no* illegal proceeds were forfeited in this case; rather, the court expressed the view that the government cannot claim that "only" proceeds were at issue. Nothing in that statement requires revision of the question we have presented.[2]

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[1] Respondent's restatement of the question presented is different from ours not because it is framed to encompass the statutory scope of forfeitable property under 21 U.S.C. 881(a)(6) and 18 U.S.C. 981, rather than the "narcotics proceeds" at issue here, but also because it ironically omits the very phrase of 21 U.S.C. 881(a)(6) that specifically authorizes forfeiture of "all proceeds traceable to such an exchange [for a controlled substance in violation of this subchapter]."

[2] As the court of appeals noted, the government claimed that "the property was forfeitable on two independent grounds: as proceeds of illegal narcotics transactions under 21 U.S.C. § 881(a)(6), and as property 'involved in' money laundering violations under 18 U.S.C. § 981(a)(1)(A)." Pet. App. 3a. The district court found probable cause to support the forfeiture "under both [the government's] 'narcotics proceeds' theory and its 'money laundering' theory." *Id.* at 4a. In our view, either theory would be sufficient to support the forfeiture, and if the forfeiture of "narcotics proceeds" is not punitive, then the sanction in this case would be fully remedial under *United States* v. *Halper*, 490 U.S. 435, 449 (1989).

We agree with respondent that the issue of whether it constitutes "punishment" when the government forfeits property that was "involved in" or "facilitated" a violation of the federal drug laws is an issue that merits this Court's review. It is precisely that question that we have presented in our petition for a writ of certiorari in *United States* v. *Ursery*, No. 95-345, a case that squarely raises the issue. The possibility that this case *may* involve some facilitating property is not a reason to alter our question presented here; rather, it is a reason to grant both this petition and our petition in *Ursery* in order to resolve the double jeopardy issues that have created conflicts and confusion in the lower courts.

Since this Court's decisions in *Halper*, *Austin*, and *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994), experience in the courts of appeals indicates substantial uncertainty and conflict over the meaning and reach of those decisions. Since the filing of our petitions in *$405,089.23* and *Ursery*, the Fifth Circuit held that the forfeiture of a vehicle under 21 U.S.C. 881(a)(4), because it was used to transport or facilitate the transportation of narcotics, constituted "punishment" for double jeopardy purposes. *United States* v. *Perez*, 70 F.3d 345 (5th Cir. 1995) (1995 WL 689385). The Sixth Circuit held that the "forfeiture of [a] car as drug proceeds under 21 U.S.C. § 881(a)(6) did not constitute punishment," and specifically rejected the "categorical rule that all civil forfeiture constitutes punishment for double jeopardy purposes" adopted by the Ninth Circuit. *United States* v. *Salinas*, 65 F.3d 551, 553 (6th Cir. 1995). The Second Circuit noted that it, unlike the Ninth Circuit, had yet not read this Court's decisions in *Austin* and *Kurth Ranch* to require it to abandon

its practice under *Halper* of "mak[ing] individualized, case-by-case determinations of whether particular civil sanctions constitute 'punishment,'" and observed that "[t]he significance of these issues is not easily overstated." *United States* v. *All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 491-493 & n.5 (2d Cir. 1995). And the Eighth Circuit has rejected the Ninth Circuit's "categorical approach to double jeopardy analysis" in the course of holding that "the forfeiture of the fruits of illegal activity is rationally related to the damages of that activity" and does not constitute punishment under *Halper*. *United States* v. *Clementi*, No. 95-2079, 1995 WL 704334, at *2-*3 (8th Cir. Dec. 1, 1995). As Judge King noted in her special concurrence in *United States* v. *Perez*, 1995 WL 689385, at *5-*6, this Court's decisions in *Halper* and *Austin* have produced "confusion" in a context that has "enormous," "practical consequences to the administration of justice."

> Traditionally, the civil forfeiture of property involved in criminal activity and the criminal prosecution of the property's owner for the same underlying conduct did not raise issues under the Double Jeopardy Clause. * * * The question, which cries out for resolution by the Supreme Court, is whether, or to what extent, *Halper* and *Austin* have changed that rule.

Id. at *5. As Judge King observed, this is "an area that the Supreme Court should revisit." *Id.* at *6.

* * * * *

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari be granted.

DREW S. DAYS, III
Solicitor General

DECEMBER 1995